

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JERRY WATSON)	
Claimant)	
VS.)	
)	Docket No. 184,717
MIKE WALKER,)	
d/b/a ARROW BODY & PAINT SHOP)	
Respondent)	
AND)	
)	
FARM BUREAU INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Kansas Workers Compensation Fund appealed both Administrative Law Judge Pamela J. Fuller's May 22, 2000, Order and her June 5, 2000, Decision. Respondent also appealed the Administrative Law Judge's June 5, 2000, Decision. The Appeals Board heard oral argument on October 4, 2000.

APPEARANCES

Claimant did not appear as he had previously settled his claim with respondent on February 8, 1995.

Respondent and its insurance carrier appeared by and through their attorney, Jim D. Mills of Garden City, Kansas. The Kansas Workers Compensation Fund (Fund) appeared by and through its attorney, Mark E. McFarland of Garden City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the June 5, 2000, Decision. Additionally, the Appeals Board has considered the May 22, 2000, transcript of proceedings on the Fund's Motion for Extension of Terminal Date.

ISSUES

At the Fund's request, its separate appeals of the Administrative Law Judge's May 22, 2000, Order that denied the Fund's Motion for Extension of Terminal Date and the Administrative Law Judge's June 5, 2000, Decision were consolidated for oral argument before the Appeals Board. The Fund, however, at oral argument, requested dismissal of its appeal of the Administrative Law Judge's May 22, 2000, Order. Therefore, the Appeals Board grants the dismissal of the appeal of the decision of the Administrative Law Judge that denied the Fund's Motion for Extension of Terminal Date.

The only issue in this case before the Administrative Law Judge and now before the Appeals Board is the liability of the Fund for all or a portion of the settlement entered between the claimant and the respondent on February 8, 1995, before Special Administrative Law Judge Linda L. Eckelman. For a September 24, 1993, accidental injury, in addition to medical treatment provided by the respondent, claimant received a compromise lump-sum settlement of \$32,000. The reasonableness of the settlement is not in dispute.

In the June 5, 2000, Decision, that is the subject of this appeal, the Administrative Law Judge found the Fund was liable for 40 percent of all the workers compensation benefits paid by respondent to the claimant as a result of the September 24, 1993, accidental injury. The specific amounts, paid by the respondent and to be reimbursed 40 percent by the Fund, are set forth in the February 8, 1995, settlement hearing transcript.

From the Administrative Law Judge's June 5, 2000, Decision, the Fund appeals and argues it has no liability for any amounts paid in this case because the respondent failed to prove claimant was a handicapped employee before the September 24, 1993, accidental injury. The Fund also, for reasons not fully explained in its argument before the Appeals Board, argues it has no liability because the respondent failed to prove claimant's resulting work injury or disability would not have occurred "but for" his preexisting impairment.

Respondent also appeals and contends it proved that claimant's resulting injury or disability would not have occurred "but for" claimant's preexisting impairment. Respondent, therefore, argues it is relieved of all liability, and the Fund is liable for reimbursement to the respondent of all the workers compensation benefits and costs paid in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and the parties' arguments, the Appeals Board makes the following findings and conclusions:

FINDINGS OF FACT

1. Sometime in late 1971 or early 1972, claimant injured his low back while working for National Beef Packing Company (National Beef) in Liberal, Kansas.
2. National Beef eventually referred claimant for medical treatment to Dr. Burgtorf in Shaddock, Oklahoma. As a result of claimant's work-related low-back injury, Dr. Burgtorf performed a two-level laminectomy and discectomy at the L4-5 and the L5-S1 vertebrae levels.
3. In 1974, claimant settled this workers compensation case with National Beef. As a result of the National Beef work accident, claimant was assessed with a 20 percent permanent functional impairment.
4. After the back surgery, claimant went to work at a manufacturing company and then worked primarily as a automobile body repairman for various employers, and on one occasion, he owned his own automobile body repair business.
5. Claimant was generally able to perform those manual labor type jobs, after his back injury, but claimant had to miss work on occasion for a day or two because of pain and discomfort in his back. Claimant was also very protective of his back while he was working and used proper body mechanics for lifting. Additionally, while he was performing the body repair work, he had a stool he could adjust to a proper height so he could keep his back upright. Furthermore, claimant wore a back brace at various times when he was working.
6. Claimant was denied employment at Southwestern Bell Telephone Company because of his previous back surgery.
7. In 1980, claimant was employed by Esley's Body Shop located in Liberal, Kansas, and worked there for approximately five years. During that period of employment, claimant had additional back problems and returned for additional treatment to Dr. Burgtorf in Shaddock, Oklahoma. He was treated on an in-patient basis by Dr. Burgtorf for one week. Claimant was off work from his employment with Esley's Body Shop for a total of 30 days.
8. Claimant started working for the respondent, Arrow Body and Paint Shop, in 1989.
9. Michael L. Walker, respondent's owner, did not have knowledge of claimant's previous back injury when he initially hired claimant. But Mr. Walker learned of claimant's back injury after claimant commenced working. Claimant, at various times, would complain

about pain and discomfort in his back from the lifting, stooping, and bending job duties he was required to perform at the body shop.

10. Because of claimant's low-back problems, Mr. Walker attempted to minimize the lifting claimant had to do on the job. Also, after claimant had back complaints, Mr. Walker would assign claimant to work duties that limited his stooping and bending.

11. Claimant remained in Mr. Walker's employment from 1989 to 1994. During that period, Mr. Walker and claimant had numerous conversations about claimant's low-back problems.

12. On September 24, 1993, claimant reinjured his low back. After that injury, the respondent sent claimant for an evaluation and treatment recommendations to orthopedic surgeon Neonilo A. Tejano, M.D., located at Hertzler Clinic in Halstead, Kansas. Dr. Tejano saw claimant first on October 29, 1993, and again on December 16, 1993. He also had claimant undergo a lumbar myelogram, a post-myelogram CT scan, and a nerve conduction study. Dr. Tejano diagnosed claimant with a complete block at the L3-4 vertebra level secondary to a massive disc herniation. Also, the doctor diagnosed claimant with degenerative disc disease at L4-5 and L5-S1, attributable to claimant's previous surgery. Dr. Tejano recommended additional surgery. But after claimant had participated in a pain program under the direction of physical medical physician, Philip R. Mills, M.D., claimant decided against surgery.

Dr. Tejano was the only physician to testify in this case. On direct examination, respondent's attorney asked Dr. Tejano the following question:

As a result of your examination and treatment of this individual, Mr. Watson, can you say within a reasonable degree of medical probability whether or not this incident or injury would have occurred but for his preexisting condition?

Dr. Tejano answered:

The presence of degenerative disc at L4-5 from previous surgery would predispose L3-4 to excessive stress. But for those two previous surgeries or injuries to those two previous discs, the injury at the L3-4 would not have occurred.

Furthermore, Dr. Tejano testified claimant had two degenerative discs as a result of the previous surgery, and claimant had to have previous back complaints to some extent because of those two bad discs. Dr. Tejano also was asked if he had an opinion within reasonable medical certainty of how much his current impairment rating would relate to his preexisting condition, and how much to his impairment after the September 24, 1993, injury. Dr. Tejano answered "We have no scientific way of apportioning the injury." He

then commented that he would normally assign 40 percent to the preexisting injury and 60 percent to the present injury.

CONCLUSIONS OF LAW

1. In a Fund liability case, the employer has the burden of proving that it knowingly hired or retained a handicapped employee.¹

2. K.S.A. 44-566 defines a handicapped employee as follows:

(b) "Handicapped employee" means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:

....

16. Any physical deformity or abnormality;

17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment.

3. There is no requirement that the employer have a mental reservation when hiring or deciding to retain a handicapped employee.²

4. It is not necessary that the employer's knowledge be of particular and medically specific injury.³

5. The Administrative Law Judge found claimant had a preexisting impairment that constituted a handicap, respondent had knowledge of the handicap, and retained claimant as a handicapped employee.

The Fund admits claimant had a previous work-related accident over 20 years ago that resulted in a low-back injury and surgery. But the Fund contends the record does not prove this previous low-back injury was a handicap to claimant obtaining and retaining employment.

¹ See K.S.A. 44-567(b) and Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 405, 701 P.2d 336 (1985).

² See Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 740 P.2d 98 (1987), *aff'd* 242 Kan. 430, 748 P.2d 420 (1988).

³ See Denton, 12 Kan. App. 2d at 268.

The Appeals Board disagrees with the Fund. The Appeals Board concludes the testimony of the claimant, respondent's owner, Michael L. Walker, and Dr. Tejano all support the conclusion that the claimant had a preexisting low-back impairment that constituted a handicap. Respondent had knowledge of the handicap and retained claimant as a handicapped employee.

6. K.S.A. 44-567(a)(1)(2) generally provides:

Once it has been determined that a knowingly retained handicapped worker has sustained an injury, the amount of the Fund's liability must be determined. The general rule is that if the ultimate injury or disability would not have occurred but for the preexisting handicap, the Fund is liable for the entire amount of the award paid for the subsequent injury. On the other hand, if the injury or disability probably or most likely would have occurred regardless of the handicap, but was contributed to by it, the Fund is only liable for that portion of the award for the subsequent injury which is attributable to the preexisting impairment.⁴

7. Here, the Administrative Law Judge, based on Dr. Tejano's testimony, found the Fund liable for 40 percent of the workers compensation benefits the respondent paid the claimant in the February 8, 1995, settlement. Respondent, however, contends Dr. Tejano's testimony established that claimant's current low-back injury or disability would not have occurred "but for" claimant's preexisting low-back injury and resulting impairment. Therefore, respondent argues the Fund is liable for 100 percent of all workers compensation benefits paid claimant in the February 8, 1995, settlement.

The Appeals Board agrees with the respondent's argument and concludes that Dr. Tejano testified, within a reasonable degree of medical probability, that but for claimant's preexisting low-back injury and surgery, the present injury found at L3-4 would not have occurred. Therefore, the Appeals Board concludes the Fund should be liable for 100 percent for the workers compensation benefits and costs paid in this case.

The Appeals Board is mindful that Dr. Tejano also expressed an opinion, not based on reasonable medical probability, that he would normally assign 40 percent to claimant's preexisting low-back injury and 60 percent to the claimant's current low-back injury. But the Appeals Board finds, if it is first determined that the resulting injury or disability would not have occurred "but for" the preexisting impairment, then the liability of the Fund is not proportioned between the preexisting impairment and the subsequent injury. Furthermore, as in this case, the Appeals Board concludes, in order for a physician to formulate a "but for" opinion, there has to be preexisting functional impairment resulting from the first injury. Even if the physician then quantifies the percentage of preexisting impairment, the

⁴See Brozek v. Lincoln County Highway Dept., 10 Kan. App. 2d 319, 323, 698 P.2d 392 (1985).

physician's "but for" opinion should not be interpreted as an opinion to proportion the award.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that Administrative Law Judge Pamela J. Fuller's June 5, 2000, Decision should be and is hereby, modified and the Fund is ordered to reimburse the respondent for 100 percent of all the workers compensation benefits and costs paid in this case as set forth in the Settlement Hearing held on February 8, 1995, before Special Administrative Law Judge Linda L. Eckelman.

The Appeals Board adopts the fees and expenses of the administration of the Kansas Workers Compensation Act as listed in the Administrative Law Judge's Decision.

The Appeals Board orders the Fund to reimburse the respondent for those fees and expenses.

IT IS SO ORDERED.

Dated this ____ day of November 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jim D. Mills, Garden City, KS
Mark E. McFarland, Garden City, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director